UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND REHABILITATION, LLC

and **Case 22-CA-029988**

1199 SEIU UNITED HEALTHCARE WORKERS EAST, NJ REGION

ORDER DENYING MOTIONS FOR RECONSIDERATION

On August 26, 2011, the Board issued a Decision and Order in this proceeding granting the Acting General Counsel's Motion for Summary Judgment and, inter alia, ordering the Respondent, on request, to bargain with 1199 SEIU United Healthcare Workers East, NJ Region as the certified collective bargaining representative of its unit employees. 357 NLRB No. 69.

On September 9, 2011, the Respondent filed a motion for reconsideration of the Board's August 26 Decision and Order. The Respondent advanced two arguments in support of its motion. First, the Respondent asserted that because the above-referenced Decision and Order was postmarked August 31, 2011, the decision issued after then-Chairman Wilma B. Liebman's departure from the Board on August 27, 2011, and is therefore void as ultra vires. Second, the Respondent argued that the Board erred in failing to order a hearing on its contentions that it changed the duties of unit employees after the Regional Director issued his Decision and Direction of Election finding that those employees are not supervisors, and that those changes establish that the employees currently possess supervisory authority and the unit is now inappropriate.

On December 30, 2011, the Board issued an Order rejecting the Respondent's motion for reconsideration.[1] With regard to the date the underlying decision was issued, the Board explained that the date of the decision reflected the date on which all participating members had voted on the final draft, and that the later reproduction, mailing, and uploading of the decision to the Board's website were purely ministerial functions that did not affect the date on which the Decision and Order issued. With regard to the alleged changes in the duties of unit employees, the Board rejected the Respondent's contentions for the reasons set forth in the Board's August 26, 2011 Decision and Order.

On January 3, March 14, and March 22, 2012, respectively, the Respondent filed its second, third and fourth motions for reconsideration. In its second motion for reconsideration the Respondent argued that the December 30, 2011 Order denying its first motion for reconsideration was improper because it issued without the participation of a quorum, as Chairman Pearce, who was a member of the panel together with then-Members Craig Becker and Brian E. Hayes, was recused. By order dated March 15, 2012, the Board denied the Respondent's second motion for reconsideration, finding that the December 30, 2011 Order was properly issued.

In its third motion for reconsideration, the Respondent argued that the December 30, 2011 order denying its first motion for reconsideration was invalid because the recess appointment of Member Becker, who participated in that decision, had expired prior to that date. While the Board was considering the third motion for reconsideration, the Respondent filed its fourth motion for reconsideration reiterating the argument from its third motion for reconsideration and asserting in the alternative that the March 15 denial of its

[1] Chairman Mark Gaston Pearce, who was recused and did not participate in the underlying decision, was a member of the panel but did not participate in deciding the merits of the motion for reconsideration.

second motion for reconsideration was improper because the recess appointments of then-Members Griffin and Block, who participated in that decision, were invalid. By order dated March 27, 2012, the Board denied the Respondent's third and fourth motions for reconsideration.

On September 14, 2011, while the first motion for reconsideration was pending, the Board filed its application for enforcement in the United States Court of Appeals for the Third Circuit.[2] Thereafter, the Respondent filed its cross-petitions for review.

At the time of the orders denying the Respondent's second, third and fourth motions for reconsideration, the composition of the Board included three persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid.

By letter dated November 19, 2015, the United States Court of Appeals for the Third Circuit requested that the parties be prepared to address the following questions at oral argument:

1) For purposes of our jurisdiction under section 10(e) of the NLRA, what effect, if any, do pending motions for administrative reconsideration have on the finality of the order for which the NLRB seeks enforcement?

2) If the NLRB lacked a proper quorum at the time it filed the administrative record with the Court, why aren't we required, under section 10(e) of the NLRA, to remand the record to the NLRB so that it can take action via a properly constituted quorum?

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[2] This is consistent with Sec. 102.48(d)(3) of the Board's Rules and Regulations, which provides:

> The filing and pendency of a motion [for reconsideration] under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

3) In light of *New Process Steel, L.P. v. NLRB*, 560 US 674 (2010) and *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014), would remanding this case so that the NLRB may take action with a properly constituted quorum be the most efficient approach?

On December 2, 2015, in light of *NLRB v. Noel Canning* and the Court's questions referenced above, the Board filed a motion for limited remand of the administrative record to allow the current Board to address the Respondent's second, third and fourth motions for reconsideration. On December 4, 2015, the Court granted the Board's motion to remand.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[4]

In its second motion for reconsideration, the Respondent contends that the Board's December 30, 2011 Order was improper because it issued without the participation of a quorum, as Chairman Pearce, who was a member of the panel together with then-Members Craig Becker and Brian E. Hayes, was recused. At footnote 2 of the Board's December 30, 2011 Order, the Board stated:

> Chairman Pearce, who is recused and did not participate in the underlying decision, is a member of the present panel but did not participate in deciding the merits of this proceeding.
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> In *New Process Steel v. NLRB*, _ U.S. _, 130 S. Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2644; see also *Correctional Medical Services*, 356 NLRB No. 48, slip op. at 1 fn. 1 (2010).

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[3] The Court denied the Board's additional request that the time period of the remand be limited to 30 days. Per Sec. 10(c) of the National Labor Relations Act, the Court retained jurisdiction over this matter.

[4] Chairman Pearce is recused and did not participate in the consideration of this matter.

Having duly considered the matter, the Respondent's second motion is denied. We find that our December 30, 2011 Order was properly issued, for the reasons stated therein.

In its third motion for reconsideration, the Respondent argues that the December 30, 2011 order denying its first motion for reconsideration was invalid because the recess appointment of Member Becker, who participated in that decision, had expired prior to that date.

Having duly considered the matter, the Respondent's third motion for reconsideration is denied. As the Court's decision in *Noel Canning* makes clear, a Senate session ends when the Senate adjourns *sine die.* Because the Senate did not adjourn *sine die* before December 30, 2011, Member Becker's term did not end prior to the Board's issuance of the December 30, 2011 order. In fact, his term extended to January 3, 2012, when one Senate session ended and the next session began**.** *Entergy Mississippi, Inc.*, 361 NLRB No. 89 (2014).

Finally, in view of our above disposition of the Respondent's second and third motions for reconsideration, the Respondent's fourth motion for reconsideration is denied as moot.

Dated, Washington, D.C., December 17, 2015

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD